

ARKANSAS COURT OF APPEALS

DIVISION III

No. CR-17-618

KABAL BURNETT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: March 28, 2018

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, NINTH
DIVISION

[NOS. 60CR-14-3123; 60CR-14-3834;
60CR-14-4038; 60CR-14-4039]

HONORABLE MARY SPENCER
MCGOWAN, JUDGE

REVERSED AND DISMISSED

MIKE MURPHY, Judge

Appellant Kabal Burnett appeals the Pulaski County Circuit Court's order revoking her probation, arguing that her motion to dismiss was improperly denied because the court lacked jurisdiction to revoke her probation for acts she committed before being placed on probation. The State concedes error. We reverse and dismiss.

On May 11, 2016, Burnett pleaded guilty to eight counts of second-degree forgery in Pulaski County. She was placed on probation for three years. On December 7, 2016, the State filed a petition to revoke probation in each of the cases. Burnett pleaded guilty on December 16, 2016, and again received probation. A new sentencing order reflecting that plea was entered on December 22, 2016, at 4:07 p.m.

On January 12, 2017, the State filed a petition to revoke Burnett's probation,

alleging that on December 22, 2016, Burnett violated the terms of her probation when she failed to report for her intake appointment that was scheduled for 10:00 a.m. on December 22, 2016.

Burnett filed a motion to dismiss and argued that at the time she missed the December 22, 2016 appointment, she was not yet on probation because the new sentencing order had not been filed. The court disagreed, reasoning that Burnett was given notice of the date for intake with the probation officer, had signed the terms and conditions of her probation, and yet still failed to appear.

Burnett subsequently filed this appeal, making the same argument to this court. That is, that the circuit court lacked statutory authority to revoke her probation because the petition for revocation was based on conduct that took place before she was placed on probation. We agree.

In a revocation proceeding, the State must prove its case by a preponderance of the evidence, and this court will not reverse the circuit court's decision unless it is clearly against the preponderance of the evidence. *Doyle v. State*, 2009 Ark. App. 94, at 3, 302 S.W.3d 607, 609. A period of probation commences to run on the day it is imposed. Ark. Code Ann. § 5-4-307 (Repl. 2013). The Arkansas Supreme Court has held that an order is not effective until it is entered of record. *Hewitt v. State*, 362 Ark. 369, 371, 208 S.W.3d 185, 186 (2005). Furthermore, until a guilty plea and resulting sentence are memorialized as a sentencing order and entered into the record, there is not an effective judgment of

conviction. *Bradford v. State*, 351 Ark. 394, 404, 94 S.W.3d 904, 910 (2003).

Garduno-Trejo v. State is on point. 2010 Ark. App. 779, 379 S.W.3d 692. There, on March 17, 2009, Garduno-Trejo pleaded guilty and was sentenced to five years' probation for possession of a controlled substance and ten years' suspended imposition of sentence for delivery of a controlled substance. *Id.* at 2, 379 S.W.3d at 693. As part of the plea agreement, Garduno-Trejo agreed to not violate any laws and abide by every requirement set out in the circuit court's order. *Id.* at 3, 379 S.W.3d at 694. On March 24, 2009, he was arrested by federal officials for selling one pound of methamphetamine. *Id.* at 1, 379 S.W.3d at 693. Two days later, on March 26, 2009, a judgment-and-disposition order was filed, reflecting the March 17, 2009 plea. *Id.* at 3-4, 379 S.W.3d at 694. The circuit court subsequently revoked Garduno-Trejo's probation and suspended sentence based on the March 24, 2009 offenses. *Id.* at 2, 379 S.W.3d at 693.

We reversed and dismissed the revocation, holding that the suspended sentence and probation were not in effect on the date they were violated (March 24, 2009) because the judgment-and-disposition order was not entered into the record until two days later (March 26, 2009). *Id.* at 8, 379 S.W.3d at 696. We rejected the State's argument that Garduno-Trejo could not demonstrate prejudice because he had signed and acknowledged the conditions of his suspended sentence and probation. *Id.* at 5, 379 S.W.3d at 694.

Here, like *Garduno-Trejo*, the date and time of the entry of judgment is at issue because the judgment was imposed (filed on December 22, 2016, at 4:07 p.m.) after

Burnett had failed to appear before her probation officer (December 22, 2016, at 10:00 a.m.). Considering our precedent, we hold that the circuit court erred by revoking Burnett's probation for conduct that occurred before that probation was imposed.

Reversed and dismissed.

GLADWIN and BROWN, JJ., agree.

William R. Simpson, Jr., Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Leslie Rutledge, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.